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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TONY T. TRAN, Defendant and Appellant.	B204026 (Los Angeles County Super. Ct. No. PA057599)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles L. Pevan, Judge. Affirmed.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Herbert S. Tetef, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Tony Tran of four counts of attempted murder. (Pen. Code, §§ 664, 187, subd. (a)[1].) As to each count, the jury found that defendant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) and personally used a firearm (§ 12022.53, subd. (b)). As to two of the counts, the jury found that defendant personally and intentionally discharged a firearm which proximately caused great bodily injury. (§ 12022.53, subd. (d).) The trial court sentenced defendant to state prison for a determinate term of 40 years and eight months and a consecutive indeterminate term of 50 years to life.

On appeal, defendant contends that there is insufficient evidence to support his convictions and that the trial court erred when it denied his motion for mistrial based on his claim that the prosecutor referred to facts not in the record in her closing argument. We affirm.

BACKGROUND

Around 9:00 or 10:00 p.m. on September 23, 2006, Stephan Chichportich and David Vandenbrouke drove to the Amazing Thai Bar and Grill in Granada Hills where they met a friend, "Hadin." The bar had been modified to be club-like for a college sorority or fraternity party, and a deejay was playing music. Chichportich drank two beers and some vodka. Vandenbrouke also drank beer and had a couple of "shots." Vandenbrouke testified that he got "pretty tipsy." Chichportich testified that Vandenbrouke was not drunk to the point where he passed out, but he "was definitely feeling it."

That night, Vandenbrouke briefly spoke with defendant at the bar. Vandenbrouke had been talking to two girls when defendant approached and said, "jokingly," "Are you

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[1] All statutory citations are to the Penal Code unless otherwise noted.

going to hit that?" Vandenbrouke responded, "Oh, you know if they are your girls, I am not even going to try." Defendant said, "No," and the conversation ended.

Later, when Vandenbrouke was looking at a woman, the woman's boyfriend became angry and asked Vandenbrouke, "Why are you, why are you staring down my girl?" Vandenbrouke responded, "She just happened to be there. I just gave her a glance. That doesn't mean that I'm trying to do anything." A sort of scuffle ensued. Two to three minutes later, Vandenbrouke was struck in the back of his head as he was leaving, causing him to fall to the ground. Vandenbrouke surmised that the boyfriend hit him because they had had an angry exchange of words. The woman and her boyfriend were of Asian descent. Vandenbrouke testified that defendant was not the boyfriend.

Danny Sanchez, a defense witness, testified that when he was at the Amazing Thai Bar and Grill on a Friday or Saturday night in September 2006, a Caucasian man bothered Sanchez's female friend. According to Sanchez, he asked the man to leave his friend alone. The man nudged Sanchez. Sanchez punched the man in the face, knocking him out.

After Vandenbrouke had been knocked to the ground, Chichportich picked him up and said, "Let's go." As they drove out of the parking lot, Vandenbrouke screamed out the window toward the bar, "Fuck Asians." Chichportich turned right out of the parking lot and drove south on Mason Avenue. Chichportich and Vandenbrouke talked as they drove. According to Chichportich, Vandenbrouke was drunk—"he was definitely feeling the alcohol, but not to, to the point where like he wanted to go to sleep or like it wasn't like highly intoxicated." Vandenbrouke's speech was not slurred, although it had been when Chichportich had picked him up from the ground.

Chichportich stopped at a red light at the first traffic signal on Mason. Vandenbrouke estimated that they had been driving for about three or four minutes when they stopped. A silver Mercedes with "really bright blue" headlights slowly pulled up next to the driver's side of Chichportich's car. At trial, Chichportich and Vandenbrouke identified defendant as the driver of the Mercedes. Chichportich had not seen defendant at the bar. Defendant asked, in an angry tone, something to the effect of "Did you guys

say fuck Asians?" Chichportich responded, "Nah. I'm sorry. You have the wrong guys." Defendant raised his hand, pointed a silver handgun at Chichportich and said, "Are you sure?" Chichportich stepped on the accelerator and ran the red light. As Chichportich accelerated, he and Vandenbrouke saw defendant shoot the gun.

Defendant pursued Chichportich and Vandenbrouke. Chichportich estimated that he reached speeds in excess of 100 miles per hour as he attempted to elude defendant. During the pursuit, defendant fired five or six shots at Chichportich and Vandenbrouke. Defendant caught up to Chichportich and Vandenbrouke. Chichportich braked hard, and defendant drove past him. Defendant made a U-turn and drove back toward Chichportich's car. As the cars passed each other, Chichportich heard another gunshot. Defendant made another U-turn. In an effort to get to an area with more traffic, Chichportich turned right onto Sherman Way. Chichportich looked for defendant's car in his rearview mirror, but did not see it. Chichportich had last seen defendant's car as he passed Saticoy, the last big street before he got to Sherman Way.

When Chichportich got home, he examined his car and saw bullet holes near the gas tank, in the rear driver's side window, in the rear passenger window, and in the trunk. Los Angeles Police Department Detective John Doerbecker examined Chichportich's car and determined that four gunshots struck the car.

Around 1:30 or 2:00 a.m. on September 24, 2006, Alejandro Ballesteros and his girlfriend, Claudia Reyes, were driving south on Mason.[2] Ballesteros turned right onto Saticoy. Shortly after he turned onto Saticoy, and before he reached Luraline Street, Ballesteros noticed a silver or white Mercedes or BMW with bright blue headlights right behind them, almost bumper to bumper with his car. At some point, the car pulled next to Ballesteros and started shooting. Ballesteros said to Reyes, "Babe, I got shot." Reyes leaned down to pick up her phone to call 911. Reyes felt something warm in her jaw and realized that she too had been shot. Ballesteros pulled to the curb.

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[2] Ballesteros testified that the events took place during the early evening of September 24, 2006.

In the early morning of September 24, 2006, Steven Miranda was driving west on Saticoy. After Miranda passed Mason, but before he reached Luraline, he heard about five gunshots. Miranda stopped his car and saw a light gray or "silverish," two-door Mercedes approaching. Miranda could not see anyone in the Mercedes because there was smoke in the car. After the Mercedes passed him, Miranda saw a stopped car with its emergency lights on. Miranda drove to the stopped car and saw a bullet hole in the driver's window. Miranda called 911.

Four days after the shooting, a police officer went to the hospital to speak with Reyes. Reyes was unable to speak because she had suffered a fractured jaw with lacerations to her esophagus and larynx, her jaw was held in place with an "external fixator," her mouth was wired shut, and she had a tracheotomy. Reyes wrote responses to the officer's questions. Reyes wrote that when the shooter shot Ballesteros and her he said something like "Got you fuckers."

Reyes remained in the hospital for two weeks. At the time of her trial testimony, Reyes had numbness in the left side of her chin and had trouble chewing. Ballesteros suffered three gunshot wounds—in the neck, left arm, and left torso. Ballesteros remained in the hospital for about one and a half weeks.

After making a police report, Chichportich described the perpetrator to a sketch artist. Chichportich described the perpetrator as being an Asian male, "kind of chunky," with facial hair, and scarring on his face. The artist made a sketch of the perpetrator based on Chichportich's description.

Detective Doerbecker interviewed Nisachon Tuchinda, a waitress and bartender at the Amazing Thai Bar and Grill who had been working the evening of September 23, 2006. The detective showed Tuchinda the sketch based on Chichportich's description. According to Detective Doerbecker, Tuchinda said, "That looks like Tony. He's a regular here at the bar." Detective Doerbecker asked Tuchinda if she knew what kind of car Tony drove. Tuchinda responded that Tony drove a silver Mercedes with blue headlights.

At trial, Tuchinda testified that defendant, whom she identified as "Tony," was "a regular customer" at the Amazing Thai Bar and Grill. According to Tuchinda, defendant was at the bar on the evening of September 23, 2006 and left before 2:00 a.m. on September 24, 2006. Tuchinda testified that she did not recognize anyone in the sketch Detective Doerbecker had shown her, and she did not know what kind of car Tony drove. Tuchinda did not remember telling Detective Doerbecker that the sketch looked like Tony and did not remember the detective asking her about the kind of car that Tony drove.

On October 15, 2006, United States Border Patrol Agent Jason Poulos was working "secondary inspection" at an immigration checkpoint in Westmoreland, California. Defendant's car was stopped and searched. Agent Poulos and another agent found a loaded handgun in the trunk of defendant's car, four live rounds of .357 ammunition under the driver's seat, and one live round under the passenger seat. In his report, Agent Poulos described defendant's car as a silver Mercedes. Defendant and "everything" were turned over to the Imperial County Sheriff's Department.

At some point, Detective Doerbecker learned that the United States Border Patrol had arrested defendant and that the Imperial County Sheriff's Department was holding him. Detective Doerbecker also learned that defendant's car was being held in an Imperial County Sheriff's Department impound lot. Later, Detective Doerbecker learned that defendant's car had been released from impound and sold five or six times at auction. Detective Doerbecker subsequently located defendant's car through DMV records. On April 11, 2007, Detective Doerbecker took photographs of the vehicle's headlights and determined that they were white.

Tin Nguyen, a defense witness, testified that he had known defendant since 1994, that he had seen defendant's headlights, and that he had never known them to be blue. Nguyen had last seen defendant's car in the first or second week of September 2006. A Mercedes technician testified that a "client" can purchase blue headlights from any auto parts store and change the headlights on a Mercedes in about five or 10 minutes. According to the technician, the color of defendant's Mercedes was "horizon blue."

Los Angeles Police Department firearms analyst Starr Sachs compared two bullets recovered from the shooting involving Ballesteros and Reyes. Sachs determined that the caliber of those bullets could have been .38, .357, or 9-millimeter and that they were fired from the same gun. Sachs then compared those bullets with bullets test-fired from the handgun recovered from defendant's car and could not conclusively determine that they were fired from the same gun.

Chichportich identified defendant from a six-pack photographic lineup on October 29, 2006, and at trial. Vandenbrouke initially told the police that he would not be able to recognize the car or the suspect. At trial, Vandenbrouke explained that that was untrue; he had been holding back out of fear for his and Chichportich's safety if he identified the suspect. Vandenbrouke identified defendant from a six-pack photographic lineup on September 24, 2006, at a pretrial hearing, and at trial.

Defense witness Dr. Mitchell Eisen, a psychologist, testified about various factors that may make eyewitness identification unreliable. Dr. Eisen testified that persons who are intoxicated tend to be less successful in identifying persons than those who are not intoxicated. Cross-racial identifications are less reliable that same-race identifications. "Unconscious transference" is confusing a similar face associated with an event with the face of the perpetrator—such as where a witness confuses a bystander for the perpetrator. Dr. Eisen explained that he was not offering his opinion about whether the witnesses in this case identified the correct person.

DISCUSSION

I. Sufficient Evidence Supports Defendant's Convictions

Defendant contends that there is insufficient evidence to support his convictions because the evidence failed to establish his identity as the shooter. Sufficient evidence of identity was adduced.

A. Standard of Review

"'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' ([*People v.*] *Rowland* [(1992)] 4 Cal.4th [238,] 269, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) We apply an identical standard under the California Constitution. (*Ibid.*) 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' (*People v. Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738].)" (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

"In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young, supra,* 34 Cal.4th at p. 1181.) "Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime." (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

B. Application of Relevant Legal Principles

Defendant argues that the evidence of his identity as the shooter is insufficient because it is based on the "thoroughly discredited and demonstrably unreliable" eyewitness identifications of Chichportich and Vandenbrouke, and on Detective Doerbecker's testimony that Tuchinda told him that she believed that defendant drove a silver Mercedes with blue headlights, which testimony Tuchinda would not confirm. We disagree.

Chichportich and Vandenbrouke identified defendant as the shooter at trial. Chichportich and Vandenbrouke testified that the shooter drove a silver Mercedes with blue headlights. Ballesteros testified that the shooter drove a silver or white Mercedes or BMW with blue headlights. Detective Doerbecker testified that Tuchinda told him that defendant drove a silver Mercedes with blue headlights. Although defendant's Mercedes did not have blue headlights when it was impounded, a Mercedes technician testified about the easy steps required to change the color of headlights. Within a few weeks of the shooting, defendant was found in possession of a handgun of a caliber that could have fired the bullets recovered from the Ballesteros and Reyes shooting. This evidence is sufficient to establish defendant's identity as the shooter.

In arguing that the evidence that he was the shooter is insufficient, defendant first argues that it "strains credulity" that he could have heard Vandenbrouke shout "Fuck Asians," decided to react, paid his bar bill, gone to his car, got into his car and started it, grabbed his gun, loaded his gun or made sure it was loaded, and had sufficient time to catch up to Chichportich's car that was stopped at the first traffic signal. There is no evidence in the record that defendant did any of the things he claims he had to do before catching up to Chichportich's car. One could just as easily speculate that defendant was in his car, ready to leave the Amazing Thai Bar and Grill when he heard Vandenbrouke's slur.

Defendant next argues that contrary to witness testimony, his car is indisputably blue. Defendant suggests that lighting may make a blue car appear silver, but no evidence was presented to that effect. A reasonable juror could conclude that although the designated color of defendant's car was "horizon blue," the car's color appeared to be silver to those who saw it.

Defendant also argues that no one testified that he drove a Mercedes with blue headlights. Detective Doerbecker testified that Tuchinda told him that defendant drove a silver Mercedes with blue headlights. That Tuchinda denied telling Detective Doerbecker that defendant drove a silver Mercedes with blue headlights only created a conflict in the evidence or a credibility issue that the jury was to resolve. (*People v.*

Young, supra, 34 Cal.4th at p. 1181.) Likewise, it was solely the jury's responsibility to resolve any conflict between Tuchinda's statement to Detective Doerbecker that defendant's Mercedes had blue headlights and Nguyen's testimony that he had never seen blue headlights on defendant's car. (*Ibid.*)

Finally, defendant argues that we should reject Chichportich's and Vandenbrouke's eyewitness identifications because they were made under some of the conditions that Dr. Eisen identified as causing eyewitness identifications to be less reliable. Even if the jury entirely rejected Vandenbrouke's testimony, Chichportich's testimony was sufficient evidence to support the jury's finding that defendant was the shooter. Contrary to defendant's contention that Chichportich had only a "split-second" or seconds to view the shooter and that most of that time Chichportich's attention likely would have been focused on the gun, the evidence shows that Chichportich and the shooter engaged in a short conversation before the shooter produced the gun, giving Chichportich ample time to view the shooter's face without any distraction caused by the gun.

II. The Trial Court Properly Denied Defendant's Motion For A Mistrial

Defendant contends that the trial court abused its discretion when it denied his motion for mistrial based on his claim that the prosecutor referred to facts not in the record in her closing argument. The trial court did not err.

A. Factual Background

During Tuchinda's trial testimony, the prosecutor examined Tuchinda about the condition of defendant's skin in September 2006 as follows:

"Q [Prosecutor] Okay. Now back at on September 23rd, 2006, what was Tony's facial skin like? Was it smooth and soft? Or did it have any pimples?

"A [Tuchinda] It's not smooth.

"Q Do you know what acne is?

"A Yeah. But I cannot remember that day.

"Q Do you recall that just before you came to court this afternoon, Detective Doerbecker and I were talking to you –

"A Uh-hum.

"Q -- in the library in the District Attorney's office?

"A Yes.

"Q Do you recall that I asked you that question about Tony's skin?

" A Yes.

"Q Do you recall isn't it –

"A Yeah. His skin is not smooth.

"Q Okay. Did it have scars on it back in September of 2006?

"A I know maybe like a pimple or something like that.

"Q So you memory is that in September of 2006 Tony's skin had pimples on them?

"A Yes."

In closing argument, the prosecutor, addressing Tuchinda's testimony, stated, "I suggest to you, ladies and gentlemen, that for one reason or another she wasn't forthcoming when she was here in court." The prosecutor stated that Tuchinda, in the days after the shooting, had given Detective Doerbecker information that led the detective to defendant. That information included a description of the car as a silver Mercedes with blue head lamps, a name, and a telephone number. The prosecutor then said, "But when Tuchinda testified at trial she was reluctant to give me information, which she had related to me a half hour before when I interviewed her in the D.A.'s office." Defense counsel stated that he wanted to "reserve an objection" to the prosecutor's argument.

The prosecutor continued, "I asked her, when she was testifying about whether or not Mr. Tran had bad skin on the day of the shooting, and she says, no, I don't remember. [¶] I said, didn't you tell me just earlier today when we met in the D.A.'s office with Detective Doerbecker that he had bad skin? [¶] And she said, oh, yeah. Yes, he had bad

skin. [¶] She was reluctant to give me information that she had given me a half hour before."

Later, discussing the evidence of identification, the prosecutor said, "Well, we know the defendant was in the bar that night, because Tuchinda said that he was in the bar that night. We know that he had bad skin because she said it. When the event was close and before maybe she knew that they [*sic*] were consequences to her testimony, she told Doerbecker he had bad skin, a silver Mercedes with blue head lamps."

At the close of the prosecutor's argument, defense counsel put his objection on the record, stating "I think the law is the prosecutor in closing argument shall not testify about a witness told to her in preparation session. It's improper for a prosecutor to vouch for herself as a witness or interject her testimony without evidentiary basis. The jury must be instructed that [the prosecutor] erred when she stated what Mae Tuchinda told her that the car is blue and the headlights are blue. It's improper."

The prosecutor responded that defense counsel had mischaracterized her argument. The prosecutor explained, "I – that's not what I said. I, I commented about the fact that during my direct exam I asked Ms. Tuchinda did he – I have, did the defendant have pimples on his skin? [¶] And she said no. [¶] I said, well, didn't you tell me half an hour ago that he had pimples on his skin? [¶] Then she admitted, yeah, I told you half an hour ago that he had pimples on his skin. [¶] That's what I argued to the jury."

The trial court ruled, "I don't think what [the prosecutor] did was improper or vouching for a witness. She attempted to impeach a witness of her – one of her own witnesses. And doing anything else, I think what she did was, it was proper argument. And so if there is an objection, it will be overruled." Defense counsel stated, "Just to protect my record, then, your honor would deny a motion for mistrial?" The trial court said, "Yes."

B. Standard of Review

We review a trial court's denial of a motion for mistrial for an abuse of discretion. (*People v. Williams* (2006) 40 Cal.4th 287, 323.)

C. Application of Relevant Legal Principles

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.]" (*People v. Haskett* (1982) 30 Cal.3d 841, 854; *People v. Williams, supra,* 40 Cal.4th at p. 323 ["'A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged . . . .'"].) A prosecutor's misconduct may serve as the basis for a mistrial. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1154.)

A prosecutor's trial conduct "'"violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

A prosecutor commits misconduct if he refers to matters outside the record in argument to the jury. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa, supra,* 15 Cal.4th at p. 841.)

One of the factual bases for defense counsel's motion for mistrial and, apparently, defendant's argument on appeal, is that the prosecutor argued to the jury that Tuchinda told her in a conversation outside of the jury's presence that defendant drove a car with blue headlights. That factual basis is incorrect. The prosecutor did not argue to the jury that Tuchinda told her that defendant drove a car with blue headlights. Instead, in that

portion of the prosecutor's closing argument to which defense counsel objected, the prosecutor properly discussed Tuchinda's trial testimony concerning the condition of defendant's skin. Defendant also refers to that subject. In that testimony, set forth above, the prosecutor asked Tuchinda if she recalled that the prosecutor had asked her about Tony's skin during a conversation in the District Attorney's office library just before Tuchinda came to court that day. Tuchinda responded, "Yes." Accordingly, the prosecutor did not engage in misconduct (see *People v. Cunningham, supra,* 25 Cal.4th at p. 1026; *People v. Samayoa, supra,* 15 Cal.4th at p. 841) and the trial court did not abuse its discretion in denying defendant's motion for a new trial (*People v. Williams, supra,* 40 Cal.4th at p. 323).

On appeal, defendant also contends that the prosecutor compounded the damage caused by her misconduct when she later stated in her argument to the jury, "When the event was close and before maybe [Tuchinda] knew that they [sic] were consequences to her testimony, she told Doerbecker he had bad skin, a silver Mercedes with blue head lamps." The prosecutor's statement, defendant contends, suggested to the jury that the prosecutor had knowledge, obtained outside of the proceedings, that Tuchinda had been threatened or otherwise told not to testify truthfully. This statement could not have had a compounding prejudicial effect because the prosecutor's initial statement was not misconduct. Moreover, defense counsel did not object after the prosecutor made this statement or discuss this statement in his motion for mistrial and defendant does not contend on appeal that this statement is an independent basis upon which the trial court should have granted a mistrial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.